



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : **MAN/00CJ/HMG/2022/0001 FVH**

Property : **36 Stratford Grove West,
Newcastle upon Tyne NE6 5BB**

Applicants : **Ben Woods and Caroline Bunton**

Respondents : **Mr James Wicks and Mr John Wicks**

Type of Application : **Housing and Planning Act 2016 Section 41(1)**

Tribunal : **Tribunal Judge W L Brown
Mr I R Harris MBE FRICS (Valuer Member)**

Date of Hearing : **25 November 2022**

DECISION

REASONS

The Applications

1. By application dated 17 January and 11 February 2022 respectively (the Application), Mr Ben Woods and Ms Caroline Brunton sought a Rent Repayment Order (RRO) pursuant to section 41(1) of the Housing and Planning Act 2016 (the 2016 Act) in relation to their tenancy of the Property. The Respondents are the persons with control and management of the Property and the former landlord of the Applicants.
2. Directions were issued on 17 April 2022 pursuant to which the Applicants and the Respondents made written submissions. There was no question that the Application was brought within the statutory timeframe to do so.
3. A hearing of this matter took place as referred to above. This was a remote hearing by video which was not objected to by the parties. With the consent of the parties, the form of the hearing was by video using the Tribunal video platform (a Full Video Hearing – FVH). The Tribunal was satisfied that all relevant issues could be determined in a remote hearing. The documents that we were referred to are bundles from the parties, the contents of which we have recorded. (The parties were content with the process). The Tribunal considered it unnecessary in view of the matters in issue to conduct an inspection.
4. Both Applicants attended the hearing. Mr James Wicks appeared on behalf of both Respondents.

Applicants' Submissions

5. The basis for the Application was that the Applicants had rented the Property as residential accommodation during 1 July 2021 to 31 December 2021 and that Newcastle City Council (NCC) had confirmed the Property to have been unlicensed from 22 June 2021 to the end of their occupation on 31 December 2021, meaning an offence had been committed by the Respondents under Section 95(1) of the 2004 Act.
6. The Applicants submitted a copy of a signed assured shorthold tenancy agreement for the Property, between Mrs J Rutherford as landlord, and each of the Applicants as tenants, from 2 April 2020 to 1 April 2021, at a rent of £500 per calendar month, exclusive of utility payments. An additional amount was paid as a deposit (£550) to be held under the terms of an authorised tenancy deposit scheme. It was not in dispute that this document was evidence of the contractual arrangement for occupation of the Property by the Applicants (the Tenancy).
7. The Property is described in the Application as a lower floor 2 bedroom maisonette.

8. The Applicants advised and accepted that the Respondents became their landlord on or about 1 July 2021 (in succession to Mrs Rutherford). An office copy of the Land Registry title to the Property showed that its registered proprietors were James Ian Wicks, John Raymond Wicks and Sarah Lucy Wicks. Their ownership was registered on 8 July 2021 and the last date of sale was recorded as 7 June 2021.
9. No new written tenancy agreement had been entered into following expiry of that referred to in paragraph 6, but the Applicants had held over in occupation of the Property at the same rent payable.
10. The rent repayment requested totalled £3,000, for rent paid to the Respondents for the relevant term of the tenancy. Evidence of payments to the Respondent through bank statements was provided by the Applicants and it was agreed that only Mr Woods had paid the full £500 for July 2021, but that thereafter the Applicants had each paid 50% of the rent to the Respondents.
11. The Applicants supplied a copy of an email dated 5 November 2021 from Mr Thomas McFall, Senior Technician – Public Protection & Neighbourhoods of NCC which set out that a licence had been in place for the Property following application on 17 June 2020 until it was revoked following notification to NCC on 22 June 2021 that the Property had been sold. No new licence had been applied for and therefore the Property was unlicensed from 22 June 2021 and at the date of the email there had been no application for a licence.
12. The Applicants also presented
 - Email to Pattinsons Estate Agency dated 20 July 2020 from Ben Woods, reporting a damp issue to the maintenance team.
 - Email to Pattinsons Estate Agency dated 13 July 2021 from Ben Woods about the change of ownership of the Property and reply dated the following day stating “*The lease rolls over to the new owner and is still valid. You can request a new lease from them if that is your preference.*”
 - A text message to Mr James Wicks dated 21 August 2021 from Caroline Brunton, requesting a repair to the leaking boiler.
 - A text message to Caroline Brunton from Mr James Wicks dated 24 August 2021, declining to repair the boiler, stating that that he intended to replace it after the occupiers vacated the Property.
13. The Applicants denied the allegation that they had failed to ventilate the Property when drying clothes, causing mould growth; they said they used a condensing dryer and often ran a portable dehumidifier. They confirmed that around the time the Respondents became owners of the Property they were in the course of buying their own property and were going through a conveyancing process, which became protracted.

Respondents' Submissions

14. The Respondents accepted they were two of the three owners of the Property throughout the period 1 July 2021 to 31 December 2021. It was represented that the Applicants' contractual tenancy had ended on 1 April 2021, before the Respondents became the owners. *"The original arrangement was for the tenants to have moved into their new home and 36 Stratford Grove West to have become vacant."*
15. The Respondents accepted that the Property was in a location to which mandatory licensing with NCC applied, but no application for a licence had been made, as the Property was not fit for occupation in its current state and hence would fail an application until improvement works were carried out.
16. The Respondents set out *"Mr Ben Woods and Miss Caroline Brunton (from here referred to as BW and CB) contract with Pattinsons finished on 1st April 2021. We viewed the property on the 20th April 2021. On this date we were instructed by both the agent from Pattinsons and the tenants themselves that they had bought a new house. We were also instructed that their new house would be ready imminently and they expected to move out of the property very soon."*

Their new house is [... The covid pandemic associated reduction in stamp duty meant that conveyancing solicitors were extremely busy and behind in processing new sales. Our experience with other properties at the time led us to believe that the processing time of 36 Stratford Grove West would be several months, sufficient time for BW and CB to have moved out.

When a property is un-occupied, a license is not required. Therefore, it was our understanding that due to timings, we would not need one.

This point is also confirmed by the fact that we notified Newcastle City Council and requested a discount in council tax for an unoccupied property.

As were approaching the date of exchange the tenants contacted us, stating that the builder had experienced materials shortages and their build had been delayed. Their move in date had been put back, but we had been assured only by a minimal amount. This put us in a difficult position, where if we said we could not oblige then it would leave BW and CB homeless."

17. In effect, the Respondents' position was that they had permitted the Applicants to remain in occupation after their purchase of the Property as a gesture of goodwill.
18. They alleged that the Applicants had failed to adequately ventilate the Property, allowing mould growth in it. £510 of the deposit was forfeited to

the Respondents due to the need to engage cleaning services, to replace windows locks due to missing keys and carry out repairs.

19. The Respondents did not dispute the payments to them made as rent. The Tribunal was informed at the hearing that the Respondents hold selective licences for 5 other properties. They made no submissions regarding their financial position.

The Law

20. The relevant statutory provisions relating to Rent Repayment Orders are contained in sections 40, 41, 43 and 44 of the 2016 Act, extracts from which are set out in the Schedule.
21. Section 40 identifies the relevant offences, including an offence under Section 95(1) of the Housing Act 2004 (control or management of unlicensed premises). Subsection (4) provides that in proceedings against a person for such an offence it is a defence that he had a reasonable excuse for having control or managing the house in those circumstances.
22. Section 44(4) lists considerations which the tribunal must 'in particular' take into account in determining the amount of any repayment - conduct of the landlord and tenant, financial circumstances of the landlord and whether the landlord has been convicted of an offence to which that chapter of the 2016 Act applied. The use of the words 'in particular' suggests that these are not the only considerations the tribunal is to take into account.

Findings and determination

23. During the course of the hearing it was accepted as common ground between the parties that
 - a) at the end of the contractual tenancy of the Property on 1 April 2021 the Applicants became statutory periodic tenants, on a monthly basis;
 - b) the Respondents controlled and managed the Property in the period to which the Application related;
 - b) the Property was within the area of mandatory licensing and was required to be licensed under the scheme administered by Newcastle City Council;
 - c) there was no licence in force for the Property from 23 June 2021 (when the previous licence was revoked) until 31 December 2021, being the date when the Applicants vacated the Property.
24. The Offence under section 95(1) of having control or management of unlicensed premises where a licence is required is subject to a potentially relevant statutory defence of a reasonable excuse.

25. Whether an excuse is reasonable or not is an objective question for the Tribunal to decide.
26. The Tribunal found there were no reasonable grounds for the Respondents not applying in a timely manner for the licence, so as to be compliant by the date they became the owners of the Property, on or about 7 June 2021. The Respondents hold 5 selective licences for other properties and do not lack familiarity with the licensing scheme operated by NCC affecting the Property. There was no evidence that they were unaware of the mandatory licensing requirements in place affecting the Property.
27. The Respondents had anticipated that the Applicants, formerly tenants of the Respondents' predecessor as owner of the Property, would vacate the Property around the time of or shortly after completion of their purchase. They accommodated the Applicants' extended conveyancing of their new home. However, we had no evidence before us that a notice had been served on the Applicants to terminate their right of occupation.
28. There was no evidence before us that any proceedings had been taken against the Respondents regarding the absence of a licence, but we found no reasonable excuse defence applied to the offence under Section 95(1).
29. Having determined that a relevant offence was committed, the Tribunal found that the requirements of section 41(1) of the Act have been met. The Tribunal finds also that the requirements of section 41(2) of the 2016 Act are met - it is common ground that the Applicants were tenants of the Property during the entire period 1 July 2021 to 31 December 2021. The Applicants were therefore entitled to make the Application.

The Tribunal is, therefore, satisfied beyond reasonable doubt that the Respondents committed the offence of a person having control of or managing a premises which is required to be licensed but is not so licensed from 1 July 2021 to 31 December 2021 (inclusive) pursuant to section 95(1) of the 2004 Act.

What is the maximum amount that the Respondent can be ordered to pay under a RRO (section 44(3) of the 2016 Act)?

30. The amount that can be ordered under a RRO must relate to a period not exceeding 12 months during which the landlord was committing the offence. The Tribunal has decided that the Respondents committed the offence from 1 July 2021 to 31 December 2021, the period for which the Applicants made their application.
31. The Applicants paid and the Respondents received in this period rent totalling £3,000.00, which the Tribunal finds is the maximum amount that the Respondents can be ordered to pay under an RRO.

What is the Amount that the Respondents should pay under a RRO?

32. In determining the amount, the Tribunal must, in particular, take into account the conduct and financial circumstances of the Respondents, whether at any time the Respondents had been convicted of a housing offence to which section 40 applies, and the conduct of the Applicants.
33. There was no evidence that the Respondents were unreasonable. While the parties each raised allegations about each other – for example, that the boiler was defective, that the Property was not adequately ventilated, causing mould to grow - on the question of whether the Property was in disrepair, or that there was tenant neglect, we found that these were not material matters relevant to affect the RRO amount. We understood that the rent was exclusive of utility charges, which the Applicants paid themselves.
34. Regarding the Respondents' finances, we had before us no information, other than the income of the rent received for the letting of the subject Property. We were orally informed about the letting of 5 other properties, from which presumably the Respondents received rent. We had before us no evidence of any housing-related convictions of the Respondents.
35. The Tribunal found guidance on the amount of the RRO by considering the decision of the Upper Tribunal in *Mr Babu Rathinapandi Vadamalayan v Edward Stewart and others* [2020] UKUT 0183 (LC). Judge Cooke at [11] observed that there was no requirement that a payment in favour of Tenant in respect of RRO should be reasonable, and at [12] that this meant the starting point for determining the amount of rent is the maximum rent payable for the period in question. Judge Cooke went on to say at [14] and [15] that

“It is not clear to me that the restriction of a rent repayment order to an account of profits was consistent with Parliament’s intention in enacting sections 74 and 75 of the 2004 Act. The removal of the landlord’s profits was – as the President acknowledged at his paragraph 26 –not the only purpose of a rent repayment order even under the provisions then in force. But under the current statutory provisions the restriction of a rent repayment order to the landlord’s profit is impossible to justify. The rent repayment order is no longer tempered by a requirement of reasonableness; and it is not possible to find in the current statute any support for limiting the rent repayment order to the landlord’s profits. That principle should no longer be applied.

“That means that it is not appropriate to calculate a rent repayment order by deducting from the rent everything the landlord has spent on the property during the relevant period. That expenditure will have repaired or enhanced the landlord’s own property, and will have enabled him to charge a rent for it. Much of the expenditure will have been incurred in meeting the landlord’s obligations under the lease. The tenants will typically be entitled to have the structure of the property kept in repair and to have the property kept free of damp and pests. Often the tenancy

will include a fridge, a cooker and so on. There is no reason why the landlord's costs in meeting his obligations under the lease should be set off against the cost of meeting his obligation to comply with a rent repayment order".

36. Judge Cooke concluded at [19]

"The only basis for deduction is section 44 itself. and there will certainly be cases where the landlord's good conduct, or financial hardship, will justify an order less than the maximum. But the arithmetical approach of adding up the landlord's expenses and deducting them from the rent, with a view to ensuring that he repay only his profit, is not appropriate and not in accordance with the law. I acknowledge that that will be seen by landlords as harsh, but my understanding is that Parliament intended a harsh and fiercely deterrent regime of penalties for the HMO licensing offence".

37. The 2016 Act extended the scope of rent repayments orders with an emphasis upon rogue landlords not benefiting from the letting of sub-standard accommodation and it also removed the requirement for the Tribunal to determine such amount as it considered reasonable for the eventual order.
38. The structure of the 2016 legislation requires the Tribunal to determine first the maximum amount payable under an RRO and then to decide the actual amount payable by taking into the circumstances of the case, having particular regard to the specific factors in section 44 of the 2016 Act.
39. The Tribunal also had regard to caselaw subsequent to the Vadamalayan case, *Williams v Parmar* [2021] UKUT 244 (LC) (confirming that it is wrong to calculate the amount of the RRO starting with the full rent claimed by the tenant) and *Acheampong V Roman and others* [2022] UKUT 239 (LC), in which the Tribunal at [21] stated that the Tribunal should:
- a.) Ascertain the whole of the rent for the relevant period;
 - b.) Subtract any element for utilities only benefitting the tenant;
 - c.) Consider how serious the offence was compared to other types of offence where a RRO was made and find what proportion of the rent (less deductions referred to in b.)) is a fair reflection of the seriousness of this offence;
 - d.) Consider any further adjustments in accordance with s. 44(4)

This approach was endorsed in *Dowd v Martins and others* [2022] UKUT 249 (LC).

40. In this case the Tribunal determined that the maximum amount payable by the Respondent under a RRO is £3,000, being the whole rent paid for the relevant period, exclusive of utility costs, as calculated in paragraph 31 above. The Tribunal then considered the seriousness of the offence and the matters set out in S44(4) of the 2016 Act.
41. The Tribunal considered that in comparison with the nature of all the possible offences detailed in S40(3) of the 2016 Act, the offence committed is reasonably serious, but not the most serious for which a RRO may be made. In relation to the Respondents' conduct the Tribunal found that (1) The Respondents was experienced in management of residential property; (2) The Property was unlicensed throughout the period at issue; (3) The Respondents knew or ought reasonably to have known that the Property required a licence but did not make an application for reasons found not to amount to a reasonable excuse; (4) The Property was of a fair letting standard; (5) Apart from the failure to licence the property, the Respondents performed their duties as a landlord in a reasonable manner; (6) The Respondents were of good character and had no previous housing-related convictions known to the Tribunal; (7) The Respondents had no enforcement action taken against them by NCC in relation to the offence of having no licence.
42. Having regard to all the above, The Tribunal determined a level of two-thirds of the maximum amount.
43. In respect of the matters set out in S44(4) of the 2016 Act, the Tribunal then considered whether the findings on the Respondents' conduct and financial circumstances, and the Applicants' conduct, merited an adjustment to the amount payable. In addition to the Respondents' conduct noted above, the Respondents adduced no pertinent evidence to suggest that they would experience undue financial hardship as a result of an RRO, and The Tribunal taking all these factors into account, makes no adjustment to the level of 66.6% determined.
44. Furthermore, in respect of the conduct of the Applicants, there was no evidence put before The Tribunal regarding their conduct which would merit any adjustment.
45. This is not a case which justifies an award of the maximum amount of £3,000. The Tribunal normally considers such an award where the evidence shows that the landlord was a rogue or criminal landlord who knowingly lets out dangerous and sub-standard accommodation. The Respondent did not meet that description. We do not find that this is a case at the upper end of the scale of the sort referred to by Judge Cooke in Vadamalyan.
46. The Respondents simply failed to licence the Property and thereby committed an offence, but did so while assisting the Applicants have accommodation during the prolonged conveyancing process in which they were engaged, having throughout planned to move to their own property once its purchase could be completed.

47. Having regard to all the circumstances The Tribunal considered an order of 66.6% of the maximum sum is the appropriate sum, balancing the objective of a “fiercely deterrent scheme”, the status of experienced property managers and the length of the offending against the mitigating circumstances found in favour of the Respondent.
48. The Tribunal determined that the rent repayment order should be £2,000
49. The Applicants did not apply for reimbursement of the Application or hearing fees and the Tribunal made no order regarding those fees.

Decision

50. The Tribunal orders the Respondents to pay the Applicants the sum totalling £2,000 by way of a rent repayment order and makes no order as to the fees of the Application.

W L Brown
Tribunal Judge

Schedule

Housing and Planning Act 2016

Section 40

(1) This Chapter confers power on the First-tier Tribunal to make a rent repayment order where a landlord has committed an offence to which this Chapter applies.

(2) A rent repayment order is an order requiring the landlord under a tenancy of housing in England to—

(a) repay an amount of rent paid by a tenant, or (b).....

(3) A reference to “an offence to which this Chapter applies” is to an offence, of a description specified in the table, that is committed by a landlord in relation to housing in England let by that landlord.

The table described in s40(3) includes at row 5 an offence contrary to s72(1) of the Housing Act 2004 “control or management of unlicensed HMO” Section 72(1) provides: (1) A person commits an offence if he is a person having control of or managing an HMO which is required to be licensed under this Part (see section 61(1)) but is not so licensed.

Section 41

(1) A tenant.....may apply to the First-tier Tribunal for a rent repayment order against a person who has committed an offence to which this Chapter applies.

(2) A tenant may apply for a rent repayment order only if-

(a) the offence relates to housing that, at the time of the offence, was let to the tenant, and

b) the offence was committed in the period of 12 months ending with the day on which the application is made.

Section 43

(1) The First-tier Tribunal may make a rent repayment order if it is satisfied beyond reasonable doubt, that a landlord has committed an offence to which this Chapter applied (whether or not the landlord has been convicted).

Section 44

(1) Where the First-tier Tribunal decides to make a rent repayment order under section 43 in favour of a tenant, the amount is to be determined in accordance with this section.

(2) The amount must relate to rent paid during the period mentioned in the table.

The table provides that for an offence at row 5 of the table in section 40(3) the amount must relate to rent paid by the tenant in respect of the period not exceeding 12 months during which the landlord was committing the offence.

(3) The amount that the landlord may be required to pay in respect of a period must not exceed-

(a) the rent paid in respect of that period, less

(b) any relevant award of universal credit paid (to any person) in respect of rent under the tenancy during that period.

(4) in determining the amount the tribunal must, in particular, take into account-

(a) the conduct of the landlord and the tenant,

(b) the financial circumstances of the landlord, and

(c) whether the landlord has at any time been convicted of an offence to which this Chapter applies.



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Applicants : **Ben Woods and Caroline Brunton**

Respondents : **Mr James Wicks and Mr John Wicks**

Type of Application : **Housing and Planning Act 2016 Section 41(1)**

Tribunal : **Tribunal Judge W L Brown
Mr I R Harris MBE FRICS (Valuer Member)**

Date of Hearing : **25 November 2022**

CORRECTION CERTIFICATE

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This is a certificate under the powers conferred on the Tribunal by Rule 50 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 to correct clerical or accidental errors that have been discovered in the abovementioned Decision.

The Decision shall be amended as follows:

Page 1 Applicants	This should read ... Caroline Brunton and not Caroline Bunton
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W L Brown
Tribunal Judge
28 April 2023